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THE OPTION NOT TAKEN: A PROGRESSIVE REPORT ON CHAPTER 154 OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

Marianne L. Bell†

INTRODUCTION

Imagine the following scenario: a defendant has been sentenced to death and his state appeals have been exhausted.¹ He has the opportunity to appeal his sentence in federal court using the petition for a writ of habeas corpus.² Unfortunately, he is unsure of the contents of the petition and the filing deadline. Does he have one year to file the petition or only six months? The answer to this question turns on whether the state in which he is imprisoned follows Chapter 153 or Chapter 154 of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).³

Suppose the state asserts that Chapter 154 is applicable because it has “opted-in” by meeting the chapter’s requirements for providing competent representation to capital prisoners in state post-conviction litigation.⁴ In exchange, the state claims are expedited, post-conviction review procedures are restricted, and a six-month statute of limitations for filing habeas petitions is imposed.⁵ In reality, however, the state does not officially appoint counsel until quite some time after the defendant’s

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¹ This hypothetical is largely based on an oral argument before the United States Supreme Court. See Transcript, U.S.S.Ct. at *13-*28, *Calderon v. Ashmus*, 523 U.S. 740 (1998) (No. 97-391) available in WESTLAW, SCT-ORALARG File No. 14670.

² See generally LARRY YACKLE, POST-CONVICTION REMEDIES § 4 (1981) (explaining what a petition for writ of habeas corpus entails); 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURES § 2.2 (1988); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994). Importantly, state prisoners can use the writ of habeas corpus because 28 U.S.C. § 2254 (1996), not the Constitution, allows it.

³ See discussion *infra* Part I. See also 28 U.S.C. § 2244(d)(1) (1996) (“A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

⁴ See discussion *infra* Part I (explaining the “quid pro quo” system of Chapter 154 whereby states exchange competent counsel for more efficient review of habeas petitions).

⁵ See discussion *infra* Part I. A state is able to gain a six-month statute of limitations and unitary review procedure by opting-in to Chapter 154.

state appeals have been exhausted.⁶ The defendant then faces two choices: (1) he may file a "bare bones" pro se habeas corpus petition to try to make the 180-day limit; or (2) he may wait for counsel to be appointed and potentially violate the statute of limitation requirement.⁷

If the defendant decides to file a bare bones petition, the following scenario emerges. Counsel is appointed two months later. The lawyer is new to the defendant's case, inexperienced in federal habeas corpus law, and has few resources to spend.⁸ When the lawyer tries to amend the petition, the amendment is not allowed due to strict amendment rules.⁹ The defendant subsequently loses his habeas petition and is executed without any meaningful review of his conviction or sentence.

To avoid this outcome and clarify the requirements for habeas petitions, prisoners in several states have filed suits under 42 U.S.C. § 1983 claiming their civil rights have been violated.¹⁰ Prisoners have challenged federal courts to issue declaratory judgments about whether states opt-in under Chapter 154.¹¹ For example, in *Death Row Prisoners of Pennsylvania v. Ridge*,¹² the Third Circuit held that prisoners are able to bring such § 1983 suits to gain declaratory judgments and that the State of Pennsylvania did not qualify for Chapter 154's benefits. Conversely, in *Booth v. Maryland*¹³ the Fourth Circuit held that a prisoner *cannot* bring a § 1983 suit to gain a declaratory judgment.

The United States Supreme Court resolved the circuit split over prisoners' right to bring § 1983 suits to gain declaratory judgments in

⁶ See discussion *infra* Part I. This situation occurs frequently in states that claim to meet the requirement of Chapter 154.

⁷ See *Ashmus v. Calderon*, 123 F.3d 1199 (9th Cir. 1997), *rev'd sub nom.* *Calderon v. Ashmus*, 523 U.S. 740 (1998):

Making this choice is not a matter of litigation strategy. It is a matter of life or death. The State's announced intention [to follow Chapter 154] forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.

Id. at 1205.

⁸ See discussion *infra* Parts I and III. Chapter 154 recommends that counsel be new to the case, since many post-conviction claims attack the ability of trial and appellate counsel. Furthermore, if the state system to opt-in to Chapter 154 is inadequate, counsel may not be adequately compensated for investigation and preparation and may not have knowledge of habeas litigation.

⁹ See 28 U.S.C. § 2266(3)(B) (1996) ("No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).").

¹⁰ See discussion *infra* Part II; see also 42 U.S.C. § 1983 (1979).

¹¹ See discussion *infra* Part II.

¹² 948 F. Supp. 1258 (E.D. Pa. 1996), *aff'd*, 106 F.3d 35 (3d Cir. 1997), *overruled by* *Calderon v. Ashmus*, 523 U.S. 740 (1998).

¹³ 940 F. Supp. 849 (D. Md. 1996), *vacated*, 112 F.3d 139 (4th Cir. 1997), *aff'd*, *Calderon v. Ashmus*, 523 U.S. 740 (1998).

Calderon v. Ashmus.¹⁴ The Court held that prisoners cannot bring § 1983 suits, reasoning that the hypothetical dilemma prisoners may face does not meet the constitutional “case or controversy” requirements of Article III.¹⁵ The Court further held that questions about whether states meet opt-in requirements must be raised in habeas corpus petitions.¹⁶ However, the problem remains. Even after *Ashmus*, defendants still face the question of whether state counsel requirements are sufficient to obtain expedited review and the 180-day time limit promised under Chapter 154.

Part I of this Note will examine the history and language of Chapter 154. Part II will detail the ruling of *Ashmus*. Part III will report how states have reacted to the *Ashmus* ruling by examining recent court decisions from states that claim they have met counsel requirements. Finally, Part IV will discuss why states have failed to opt-in to Chapter 154, either by choice or because of inadequate counsel requirements, and the implications of those failures for the future of Chapter 154.

I. HISTORY AND LANGUAGE OF CHAPTER 154

A. THE POWELL COMMITTEE REPORT

1. *Background and Purpose of the Powell Committee*

Formed in June 1988 by Chief Justice Rehnquist, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (“Powell Committee” or “Committee”) provided one of the major catalysts for the AEDPA.¹⁷ Rehnquist chose retired Associate Justice Lewis Powell, Jr. to chair the Committee. Rehnquist also selected four other Committee members: Chief Judge Clark from the Fifth Circuit; Chief Judge Rodney from the Eleventh Circuit; District Judge Hodges of Florida; and District Judge Sanders of Texas.¹⁸ Florida and Texas impose the death penalty frequently, and the Fifth and Eleventh Circuits have the largest capital prisoner populations in the country; therefore, the selected judges had ample experience with federal review in capital cases.¹⁹

Rehnquist instructed the Powell Committee to analyze “the necessity and desirability of legislation directed toward avoiding delay and the lack of finality” in capital cases in which prisoners had been offered

¹⁴ 523 U.S. 740 (1998).

¹⁵ *Id.* at 745-46.

¹⁶ *See id.* at 747; *see also* U.S. CONST. Art. III; discussion, *infra* Part IIB.

¹⁷ *See* Report on Habeas Corpus in Capital Cases, 45 CRIM. L. REP. (BNA) 3239, 3239 (Sept. 27, 1989) [hereinafter “Powell Committee Report”].

¹⁸ *See id.*

¹⁹ *See id.*; *see also infra* note 147 (pointing out the frequency of executions in Florida and Texas). Consider, however, that Chief Justice Rehnquist “packed” the Committee with pro-death penalty members.

counsel.²⁰ The Committee met six times over fifteen months, listening to various presentations and requesting written comments from federal and state prosecutors, groups opposed to "the death penalty, state executives and legislators and criminal defense and public defender organizations."²¹

2. *Findings of the Committee*

The Committee reached three basic conclusions about capital litigation. First, the Committee found that "unnecessary delay and repetition" were at the root of many complaints about the system.²² They observed that several factors contribute to the delay and repetition: (1) coordination problems between federal and state legal systems result in prisoners moving back and forth between the systems before exhausting state remedies; (2) constant suits over stays of execution occur because prisoners have no incentive to initiate and pursue collateral remedies until their execution dates are set; and (3) the absence of res judicata of a statute of limitations for habeas corpus petitions allows prisoners to file multiple petitions, despite rules to curb abuse of the writ and endless filings.²³

Second, the Committee stated that the need for competent, compensated counsel is a serious problem with the current system.²⁴ Although counsel is constitutionally required for trial and direct appeal, states are not required to appoint counsel for state collateral proceedings, which are invariably utilized in capital cases.²⁵ Indigent, uneducated prisoners are therefore abandoned to handle their own complex habeas litigation, which results in constitutional claims being improperly pled and inadequately developed.²⁶ These deficiencies in the state court lead to ineffec-

²⁰ Powell Committee Report, *supra* note 17, at 3239.

²¹ *Id.*

²² *Id.* at 3239-40.

²³ *See id.*; *see also* discussion *infra* Part IV.

²⁴ *See* Powell Committee Report, *supra* note 17, at 3240.

²⁵ *See id.*; *see also* U.S. CONST. Amend. VI (giving right to counsel for trial); *Murray v. Giarratano*, 492 U.S. 1 (1989) (reaffirming that criminal defendants are constitutionally entitled to counsel *only* for trial and direct appellate review).

²⁶ *See* Powell Committee Report, *supra* note 17, at 3240; *see also* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 548-52 (1988) (citing studies that found the average educational level of death row prisoners is eight years of education, and the average I.Q. levels in various states range from less than eighty to eighty-six); *Hooks v. Wainwright*, 536 F. Supp. 1330, 1337-38 (M.D. Fla.) (reporting that one witness testified "for more than 50 percent of inmates, attempting to read a law book would be akin to attempting to read a book written in a foreign language"), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 313 (1986). *Cf.* Personal Interview with John H. Blume, Habeas Assistance and Training Project Counsel (consultants to Defender Services Committee of the United States courts); Director, Cornell Death Penalty Project and Visiting Professor of Law (Nov. 5, 1999) ("It was actually rare for inmates to be forced to represent themselves. But lawyers were routinely appointed and not paid, given no funds for experts, and appointed counsel often had no experience.").

tive and inefficient federal collateral proceedings.²⁷ Qualified counsel is eventually appointed when execution is imminent; but, by then it is often too late, as serious constitutional claims may have been waived.

Third, the Committee reported that last-minute litigation poses a concern in the current system.²⁸ The Committee stated that both judicial resources and justice are abused when proceedings about constitutional issues are conducted amidst a looming execution, and when meritless petitions are filed at the eleventh hour to seek delay.²⁹

3. *The Committee's Proposal*

To remedy these problems, the Committee strove to invent a fair and efficient system that would give petitioners "one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel"³⁰ They proposed a quid pro quo plan: if a state enacts a system, pursuant to binding state law, for the appointment, compensation, and payment of reasonable litigation expenses for competent counsel to represent indigent capital prisoners in state post-conviction proceedings, the state can impose a six-month time limit for federal habeas petitions to be filed and enforce expedited review of petitions.³¹ The Committee reasoned that this plan would ensure that collateral review would be fair, comprehensive, and result in "capable and committed advocacy."³²

Thus, rather than command individual states to comply with one federal system, the Powell Committee provided states both the option to participate in the quid pro quo plan and the option to customize counsel systems to their special needs. The Committee contended that by giving states these choices, federal and state powers would remain balanced.³³

²⁷ See Powell Committee Report, *supra* note 17, at 3239-40.

²⁸ See *id.*

²⁹ See *id.*; see also, e.g., Jane L. McClellan, *Stopping the Rush to the Death House: Third Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L. J. 201, 213-14 (1994) (discussing that eleventh hour appeals are extremely stressful for death-row inmates, who know that death is impending but are not sure when it will occur).

³⁰ Powell Committee Report, *supra* note 17, at 3240.

³¹ See *id.* at 3241-45.

³² *Id.* at 3242.

³³ It is not surprising that the Powell Committee would recommend such a system since its founder, Chief Justice Rehnquist, is an avid supporter of federalism. See, e.g. William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657 (1992):

'Our Federalism' also requires continued sensitivity so that federal courts do not cause friction by interfering with the legitimate interests of state court systems . . . I continue to believe the Powell Committee Report strikes a sound balance between the need for ensuring careful review in the federal courts of a capital defendant's constitutional claims and the need for the state to carry out the sentence once the

Specifically, the Committee proposed five new statutes outlining the plan in detail. These statutes were grouped together as "subchapter B" of Chapter 153, the law which covers habeas corpus procedures.

4. *The Committee's Recommended Statutes*

The first statute, § 2256, suggests that the new subchapter will apply to state capital prisoners and will only be applicable if "a State established by rules of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for state law purposes."³⁴ Furthermore, §§ 2256(b-d) provide that counsel *must* be offered to all state prisoners under capital sentence, standards of competency for the counsel *must* be given in the rule or statute, and the appointed counsel *must* not have previously represented the prisoner in trial or appeals unless both the prisoner and counsel specifically ask for representation to be extended to collateral appeals.³⁵ Significantly, in their comments regarding § 2256, the Committee stated that the federal judiciary has the final judgment about the adequacy of a state's counsel appointment system, and capital prisoners who doubt that the State's system meets the statutory requirements can settle their own challenges through litigation.³⁶

The second statute, § 2257, provides for a mandatory stay of execution if the state invokes the post-conviction review procedures of the subchapter. According to the Committee, the mandatory stay solves problems caused by numerous prisoners struggling against the state to gain a stay before any post-conviction review is allowed – deadlines for stay of execution litigation place "unrealistic demands on judges, lawyers, and prisoners." The mandatory stay can expire if the prisoner waives his right to file, does not file a habeas corpus petition by the 180-

federal courts have determined that its imposition was consistent with the federal Constitution.

Id. at 1657, 59.

³⁴ Powell Committee Report, *supra* note 17, at 3241.

³⁵ *See id.* The reason for this basic rule is to avoid conflict of interest problems regarding claims about the performance of trial counsel, which frequently arise in post-conviction review. *See, e.g.,* Powell Committee Report, *supra* note 17, at 3242; *Colvin-El v. Nuth*, 1998 WL 386403, at *2 (D. Md. July 6, 1998) ("[I]n order to avoid conflicts of interest with respect to challenges to the performance of appointed counsel at trial, the attorneys appointed [for post-conviction litigation] are almost exclusively 'panel' attorneys [classified groups that meet qualification criteria].").

³⁶ *See* Powell Committee Report, *supra* note 17, at 3242. In fact, there has been a great deal of litigation over whether a state system is adequate to opt-in to Chapter 154. *See also* discussion *infra* Part IV.

day deadline, or has his petition denied. Thereafter, a stay of execution or other relief is not allowed unless three conditions are met: (1) the claim for relief has not been presented in federal and state court because the state violated the Constitution or federal laws or because the Supreme Court has recognized a new, retroactive right; (2) the claim is based on new facts that could not have been reasonably discovered in time for post-conviction review; and (3) the facts of the claim are sufficient to undermine a finding of guilt.³⁷ Thus, while § 2257 allows prisoners one stay of execution, it also makes additional stays and federal review extremely limited.³⁸

The third statute, § 2258, provides that prisoners can file their federal habeas petitions up to 180 days after an order is entered appointing counsel.³⁹ A 60-day extension will be granted only if there is a good cause showing for counsel's inability to file the petition within 180 days.⁴⁰ The time limitation does not apply when a petition is pending for certiorari following state post-conviction review.⁴¹ The Committee reasoned this section should "cause understandably reluctant state prisoners to seek post-conviction review when such action may remove the only obstacle preventing the State from carrying out the death sentence."⁴²

The fourth statute, § 2259, defines the limited scope of federal habeas review.⁴³ District courts may only consider federal claims which were raised and litigated in state courts and have adequate evidentiary records and findings of fact.⁴⁴ The court must complete inadequate records before addressing the merits of the claim.⁴⁵ These requirements are analogous to existing law and practice.⁴⁶ On the other hand, § 2259 states that new claims not previously considered in state court may only be considered if one of three exceptions applies: (1) the claim is the result of a state action that violates the Constitution or federal laws; (2) the claim is the result of a new, retroactive right recognized by the Supreme Court; or (3) the claim is based on new facts that could not have reason-

³⁷ See *id.*

³⁸ *Id.* The Committee determined it was acceptable to impose such strict rules since "[o]ften, factual guilt is not seriously in dispute" and "the only appropriate exception is when the new claim goes to underlying guilt or innocence" of the capital prisoner. *Id.*

³⁹ See Powell Committee Report, *supra* note 17, at 3244. Cf. 28 U.S.C. § 2263(a) (1996), which states that the statute of limitation should begin running as soon as a prisoner's conviction is affirmed on direct review). For further discussion, see *infra* Part IV.

⁴⁰ See Powell Committee Report, *supra* note 17, at 3244.

⁴¹ See *id.*

⁴² *Id.* (explaining that typically, the only reason for a prisoner to begin post-conviction review is the scheduling or threat of scheduling an execution date).

⁴³ See Powell Committee Report, *supra* note 17, at 3245.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

ably been discovered in time to present the claim for state post-conviction review.⁴⁷

Significantly, this part of the section departs in two ways from the exhaustion doctrine articulated in *Rose v. Lundy*.⁴⁸ First, § 2259 does not allow prisoners to exhaust a new claim in state court so that it may be heard in federal court.⁴⁹ As a result, prisoners may have to comply with a filing deadline for some claims, even if state litigation has not been completed on other claims.⁵⁰ Second, the district court does not have to exhaust state remedies if one of the exceptions applies; the court is commanded to conduct an evidentiary hearing and rule on the new claim.⁵¹ Both of these changes were meant to speed up the process.⁵² According to the Committee, states "would prefer to see post-conviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine."⁵³

Finally, § 2260 eliminates the requirement that prisoners obtain a certificate of probable cause for a first appeal in habeas cases; only second or successive petitions must have a certificate.⁵⁴ The Committee reasoned that state prisoners with one chance to present their habeas petitions should be given one appeal as a matter of right.⁵⁵

The Powell Committee report was released on September 29, 1989.⁵⁶

B. CHAPTER 154

1. *The Adoption of the Powell Committee Report into the AEDPA and its Transformation into Chapter 154*

The 1996 Congress welcomed the findings of the Powell Committee. Democrats and Republicans had been debating various habeas corpus bills for fifty years.⁵⁷ However, both sides recognized that there were problems with delays in habeas litigation and deficiencies in ade-

⁴⁷ See *id.*; see also *supra* note 38 and accompanying text (explaining some of the reasoning behind the limited exception to the prohibition against additional stays and federal review in capital cases).

⁴⁸ 455 U.S. 509 (1982).

⁴⁹ See Powell Committee Report, *supra* note 17, at 3245.

⁵⁰ See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 387 (1996).

⁵¹ See *id.*

⁵² See Powell Committee Report, *supra* note 17, at 3245.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See generally Yackle, *supra* note 50, at 422-42 (discussing the debate over habeas corpus reform wherein Democrats fought to retain the strength of the "Great Writ" of habeas corpus and Republicans proposed extensive reform for prisoner litigation).

quate counsel for capital prisoners.⁵⁸ Members on both sides desired to change the current system which some believed decreased Americans' confidence in the criminal justice system, harmed victims' families, and diminished prisoners' chances for legitimate appeals.⁵⁹ In fact, the new Republican Contract with America included a Taking Back Our Streets Act which maintained that because "thousands upon thousands of frivolous petitions clog the federal district court dockets each year," the limit to file habeas claims should be one year, reduced to six months for capital cases.⁶⁰ Republicans also proposed that federal courts consider federal habeas petitions within a specific time frame.⁶¹ Thus, the time was right for federal habeas reform and politicians agreed with the Powell Committee; Congress adopted a majority of the Committee's recommendations.

On April 26, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).⁶² Clinton, a "new Democrat," wholeheartedly supported the anti-terrorism provisions of the bill; he had previously adopted the "get tough on crime" slogan of the Republicans.⁶³ Although Clinton expressed serious concern about the Supreme Court's future interpretations of the new habeas corpus proposals and warned that the AEDPA should not be unfairly read to im-

⁵⁸ 135 CONG. REC. S13471-04 (1989) (statement of Sen. Biden).

⁵⁹ *Id.* at S13472; see also HOUSE COMM. ON THE JUDICIARY, 104th CONGRESS, REPORT ON FEDERAL HABEAS CORPUS REFORM (Ronald S. Matthias) (Comm. Print 1994), available in WESTLAW, CONGTMY File No. 14168985 (arguing that crime victims are not receiving "timely justice" which would give them "closure," and that the large amount of time between sentencing and execution causes a decrease in the public's faith that justice will be served); Senate and House Committee News Conference on Webwire-Anti-Terrorism Bill, (April 15, 1996) (statement of Senator Orrin Hatch), 1996 WL 199479 (many people personally affected by the Oklahoma City bombing were present):

At long last, after more than a decade of effort, we're about to curb these endless, frivolous, costly appeals of death sentences, and as so many people standing here with us today know, habeas (sic) reform is the only substantive provision in this bill that will directly affect the Oklahoma City bombing case.

Id.

⁶⁰ CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 43-44 (Ed Gillespie & Bob Schellhas eds., 1994).

⁶¹ See *id.* at 43.

⁶² See *supra* note 59 and accompanying text. The AEDPA was signed into law eight days after the one-year anniversary of the Oklahoma City bombing.

⁶³ See Remarks By the President, Radio Address to the Nation, WEEKLY COMP. PRES. DOC. 1493 (July 16, 1994). The President is quoted as saying:

This crime bill . . . provides tough punishments for violent criminals like "three strikes and you're out," and provides about \$8 billion to build prisons to ensure that violent criminals can be locked up . . . This crime bill will make a real difference across our country in every neighborhood, every city, every town. It will help to lower the crime rate. It's what the American people are waiting for.

Id.

pinge on the vindication of federal rights,⁶⁴ he ultimately signed the bill because, "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served."⁶⁵ Sections 2256-60 (Subchapter B) became section 107 of the AEDPA, and when the AEDPA was passed, the statutes were codified as 28 U.S.C. §§ 2261-66 and renamed Chapter 154.⁶⁶

2. *The Text of Statutes in Chapter 154*

Two of the Committee's recommended statutes were adopted verbatim. Section 2256 (appointment of counsel and procedures for appointment) corresponds exactly with 28 U.S.C. § 2261.⁶⁷ Section 2257 (mandatory stay of execution given, duration and limits on stays and treatment of successive petitions) corresponds exactly with 28 U.S.C. § 2262.⁶⁸ However, there were several modifications to the Powell Committee's other suggestions.

First, 28 U.S.C. § 2263 (discussing the filing of habeas petitions, time limitations and tolling rules) decreases the amount of time for an extension to 30 (rather than 60) days as in section 2258.⁶⁹ Second, 28 U.S.C. § 2264 (discussing the scope of federal review and district court adjudications) omits the parts of § 2259 which commands courts to "determine the sufficiency of the evidentiary record" and then "conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review."⁷⁰ Third, 28 U.S.C. § 2265 makes a new addition to the Committee's recommendations by giving definitions of "unitary

⁶⁴ See Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 17 (April 24, 1996). The President signed the AEDPA with the hope that the Supreme Court would interpret part of Chapter 153, 28 U.S.C. §2254(d) (or section 104(4)), not as a "strict liability" standard of review for habeas petitioners, but as a fairer standard. President Clinton wrote:

I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bed-rock constitutional principle of an independent judiciary . . . section 104(4) is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court. Preserving the Federal courts' authority to bear evidence and decide questions of law has implications that go far beyond the issue of prisoners' rights. Our constitutional ideal of a limited government that must respect individual freedom has been a practical reality because independent Federal courts have the power 'to say what the law is' and to apply the law to the cases before them. I have signed this bill on the understanding that the courts can and will interpret these provisions of section 104 in accordance with this ideal.

Id.

⁶⁵ See *id.*

⁶⁶ 28 U.S.C. §§ 2261-66 (1996).

⁶⁷ Compare 28 U.S.C. § 2261 with Powell Committee Report, *supra* note 17, at 3241-42.

⁶⁸ Compare 28 U.S.C. § 2262 with Powell Committee Report, *supra* note 17, at 3242-43.

⁶⁹ Compare 28 U.S.C. § 2263 with Powell Committee Report, *supra* note 17, at 3244.

⁷⁰ Compare 28 U.S.C. § 2264 with Powell Committee Report, *supra* note 17, at 3245.

review,” “post-conviction review,” and “direct review,” as well as giving another description of how counsel should be appointed.⁷¹ Fourth, 28 U.S.C. § 2266 adds to the Committee recommendations by stating that the 180-day limit applies to prisoners’ initial petitions, successive petitions, and any petitions following remand by a court of appeals or the Supreme Court.⁷² No amendments are allowed except when grounds from 28 U.S.C. § 2244(b) apply.⁷³ Further, 28 U.S.C. § 2266 articulates factors for determining whether an extension of time should be given under 2263(b)(3) and commands courts of appeals to render final decisions on petitions no later than 120 days after the last brief is filed.⁷⁴ Finally, note that the Committee’s section 2260 – which eliminated the requirement that a prisoner receive a certificate of probable cause for a first appeal – was wholly rejected by Congress when it adopted Chapter 154.⁷⁵

Despite the aforementioned modifications made by Congress, the basic plan of the Powell Committee remains intact in the AEDPA. If states create and adopt a system for appointing qualified counsel for capital prisoners, they opt-in to the benefits of enforcing 180-day time limits for filing petitions, restricting the ability to amend petitions by precluding defaulted claims, and giving petitions constrained, unitary review by enforcing time limits for decisions by the districts courts and courts of appeal. Salient questions, however, remain unanswered. For example, what type of system must a state have to opt-in? What requirements are necessary for counsel to be “qualified” to handle post-conviction cases? And how should prisoners respond when a state does not offer an adequate system of qualified counsel, but attempts to enforce Chapter 154 anyway?

Troy Ashmus, a death row inmate in California, faced such a situation.⁷⁶ Ashmus wanted to challenge the State of California’s claim that it successfully met the requirements to opt-in.⁷⁷ He sought a ruling on whether California in fact met the requirements before he filed his petition, so he could determine what claims to make in his petition and whether he had six months or a year to file it.⁷⁸

⁷¹ Compare 28 U.S.C. § 2265 with Powell Committee Report, *supra* note 17, at 3241-45.

⁷² 28 U.S.C. § 2265(c) also states that the tolling of the 180 days will not begin until a transcript of the trial proceedings is available to the prisoner. See 28 U.S.C. § 2265(c)-(d).

⁷³ Compare 28 U.S.C. § 2266 with Powell Committee Report, *supra* note 17, at 3241-45.

⁷⁴ See *id.*

⁷⁵ Compare 28 U.S.C. § 2261-66 with Powell Committee Report, *supra* note 17, at 3245.

⁷⁶ See discussion *infra* Part II.

⁷⁷ See *id.*

⁷⁸ See *id.*

II. CALDERON V. ASHMUS

A. THE LOWER COURT'S HOLDINGS AND RATIONALE

A jury in the State of California sentenced Ashmus to death in 1991 for felony murder.⁷⁹ The Supreme Court of California affirmed his conviction and sentence on December 5, 1991.⁸⁰ Two years later, Ashmus filed a *pro se* Application for Appointment of Counsel for his federal habeas corpus proceeding as well as a Request for Stay of Execution.⁸¹ Counsel was not appointed until August of 1995,⁸² and Ashmus and his counsel planned on filing his final petition for habeas review by August 2, 1996. California, however, claimed it met the requirements to opt-in to the expedited review procedures established by Chapter 154,⁸³ which meant that Ashmus would have to file the final petition by January of 1996 and would be forced to "guess as to whether and how Chapter 154 may constrain [his] ability to seek redress in the federal courts for deprivations of [his] constitutional rights."⁸⁴ Additionally, Ashmus would forfeit his rights under Chapter 153 pursuant to California's claim that it met Chapter 154.⁸⁵

Ashmus filed suit under 42 U.S.C. § 1983 challenging the application of Chapter 154's expedited review provisions to his conviction.⁸⁶ Using the suit as a ticket to federal court, Ashmus became the class representative of the approximately 438 other California death row inmates, many of whom were awaiting appointment of counsel.⁸⁷ Ashmus sought a declaratory judgment that California did not meet the requirements to opt-in to Chapter 154.⁸⁸ In addition to holding that death row prisoners satisfied requirements for certification as a class for a class action suit,

⁷⁹ *People v. Ashmus*, 54 Cal.3d 932, 2 Cal.Rptr. 2d 112, 820 P. 2d 214 (Cal. 1991), *reh'g den.*, Jan. 29, 1992, *cert. den.*, 506 U.S. 841 (1992). Ashmus was also found guilty of raping a child less than 14 years of age, sodomy, and lewd or lascivious conduct. *See id.*

⁸⁰ *See id.*

⁸¹ *See Ashmus v. Calderon*, No. 93-0594 (N. Dist. Cal.); *see also* Special Requirements for Capital Habeas Corpus Petitioners, N. Dist. Cal. C.P.R. 298-8(b) (stating that a capital prisoner's *pro se* application for appointment of counsel and temporary stay of execution is technically a petition for writ of habeas corpus with leave to amend the petition when counsel is appointed); *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 2572-73 (1994) (concluding that a "post-conviction proceeding" within the meaning of [21 U.S.C.] § 848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting appointment of counsel for his federal habeas corpus proceeding").

⁸² *Ashmus v. Calderon*, 935 F. Supp. 1048, 1054 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997), *rev'd sub. nom.* *Calderon v. Ashmus*, 523 U.S. 740 (1998).

⁸³ *See Ashmus*, 935 F. Supp. at 1056 (listing statutes under which California claimed to have a "comprehensive scheme of interlocking, cross-implementive provisions").

⁸⁴ *Id.* at 1056-57.

⁸⁵ *See id.*

⁸⁶ *See* 42 U.S.C. § 1983 (allowing an action for a person who is deprived of any "rights, privileges, or immunities secured by the Constitution and laws").

⁸⁷ *See Ashmus*, 935 F. Supp. at 1054.

⁸⁸ *See id.*

the district court held that Chapter 154 should not apply to prisoners in California.⁸⁹ The court held that Chapter 153, allowing a one-year statute of limitations and non-unitary review procedures, applied.⁹⁰ According to the court, California neither established nor met mandatory guidelines for counsel required under 154.⁹¹

The court held that state statutes for the appointment and compensation of competent counsel in unitary review proceedings were objectively deficient for several reasons.⁹² First, California's standards for counsel failed to satisfy Chapter 154's requirements. The standards were not articulated in a rule of court or statute, nor were they mandatory. Moreover, they were substantively insufficient⁹³ – knowledge of habeas law was not required to handle post-conviction litigation.⁹⁴ Second, California's offer of counsel was not bona fide since in many cases the state failed to appoint counsel after the prisoners had accepted the state's initial offer of counsel.⁹⁵ Third, appointed counsel's duties were "limited to an investigation of potentially meritorious grounds for habeas corpus

⁸⁹ See *id.* at 1062, 1075.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *supra* notes 82-85 and accompanying text.

⁹³ See *Ashmus*, 935 F. Supp. at 1072. The Court explains that California tried to give "post hoc rationalizations" for an old system (which did not include mandatory or official rules/statutes) rather than take positive action on a new system as Congress intended; the state argued that they satisfied the counsel requirement through Section 20 of the "Standards of Judicial Administration Recommended by the Judicial Council." *Id.* (emphasis added). Section 20 states that every "appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals . . . should follow the guidelines in this section" *Id.* (emphasis added). The guidelines list minimum qualifications for handling death penalty cases as:

(1) actively practicing law for four years in California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellants' opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

Id.

⁹⁴ The fact that California does not require counsel to have experience with or knowledge of habeas corpus law is significant, not only because the goal of the plan is to speed up litigation by appointing qualified counsel to handle habeas petitions, but also because habeas is one of the most complex areas of law. See "*You Don't Have To Be a Bleeding Heart, Representing Death Row: A Dialogue Between Judge Abner J. Mikvah and Judge John C. Godbold*," HUMAN RIGHTS, Winter 1987, 22, 24 (Judge Godbold explains that "[t]he average trial lawyer, no matter what his or her experience, doesn't know any more about habeas than he does about atomic energy. . . [Habeas] is the most complex area of law I deal with."). But cf. *Ashmus*, 123 F.3d at 1208 (arguing that although habeas law is complex, a standard requiring knowledge of habeas law should not be adopted because it would exclude "many lawyers who could competently represent a condemned prisoner").

⁹⁵ See *Ashmus*, 935 F. Supp. at 1074-75. California had offered counsel to 130 inmates who accepted the offers, but California failed to officially "appoint" the counsel promptly after the prisoners' acceptance, which runs counter to 28 U.S.C. § 2261(c) and 28 U.S.C. § 2265(b).

which have come to counsel's attention in the course of preparing the appeal."⁹⁶ In other words, unless a collateral claim could be gleaned from the appellate record, it was not eligible for investigation or compensation in California.⁹⁷ This procedure directly conflicts with 28 U.S.C. § 2265(a)'s requirement that a unitary review procedure must allow prisoners to raise *all* collateral attacks on direct review and the state must provide reasonable compensation for the expenses of an investigation of those collateral attacks.⁹⁸

Ultimately, the court held that declaratory relief was appropriate because the prisoners satisfied the requirements for a preliminary injunction.⁹⁹ The court reasoned that the state's threats to invoke Chapter 154 were costing prisoners their rights under Chapter 153, and without injunctive relief, the state would continue to assert that Chapter 154 applied.¹⁰⁰ The court also issued a preliminary injunction declaring that the State of California was restrained from trying to obtain the benefits of Chapter 154 for California, and granted prisoners a stay to appeal to the Ninth Circuit.¹⁰¹

The Ninth Circuit Court of Appeals affirmed the District Court's ruling.¹⁰² The Court first rejected the State of California's defenses. Because the prisoners could identify a "continuing or impending violation of the law," the Court held that Ashmus' action satisfied the exception to Eleventh Amendment immunity as established in *Ex Parte Young*.¹⁰³ In addition, the prisoners had a sufficient "case or controversy" as required for relief under both the Declaratory Judgment Act and Article III of the Constitution.¹⁰⁴ Ashmus proved that California's threats to invoke expedited review of Chapter 154 would "significantly affect the plaintiff class' ability to obtain habeas corpus review by a federal court."¹⁰⁵ The

⁹⁶ *Id.* at 1071 (quoting *In re Clark*, 5 Cal.4th 750, 21 Cal.Rpt.2d 509, 531, 855 P.2d 729, 751 (1993)).

⁹⁷ *See id.* at 1074; *see also* 28 U.S.C. § 2265(a).

⁹⁸ *See Ashmus*, 935 F. Supp. at 1074.

⁹⁹ *See id.*

See id. at 1075.

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See Ashmus*, 123 F.3d at 1209.

¹⁰³ *Id.* at 1204. *See supra* notes 93-94 and accompanying text.

¹⁰⁴ *Ashmus*, 123 F.3d at 1206-07.

¹⁰⁵ *Id.* The Court continues:

[Ashmus] demonstrated that the class members may be forced to immediately file bare-bones petitions to comply with the six-month filing deadline under Chapter 154. There is no guarantee that, after filing such a bare bones petition, a district court will allow its amendment. *See* 28 U.S.C. § 2266(b)(3)(B). By having to file an immediate federal habeas petition, class members may waive or fail to sufficiently develop meritorious claims.

Court held that California did not meet Chapter 154's standards of competency and compensation of appointed attorneys in death penalty cases adopted by its court of last resort necessary for California to qualify for 154's limitations on habeas review.¹⁰⁶ Ultimately, the Court affirmed both the declaratory judgment and grant of preliminary injunctive relief.¹⁰⁷ The United States Supreme Court granted the State of California's petition for a writ of certiorari.¹⁰⁸

B. THE SUPREME COURT'S HOLDING AND RATIONALE

The United States Supreme Court unanimously reversed the Ninth Circuit Court of Appeals.¹⁰⁹ Chief Justice Rehnquist wrote the majority opinion, holding that death row prisoners' § 1983 suits for declaratory judgment should be dismissed because they did not satisfy the "case or controversy" requirement set forth in Article III.¹¹⁰ The majority reasoned that although the Declaratory Judgment Act permits federal courts to award relief in cases that fall outside the constitutional definition of an Article III "case," the Court could not grant Ashmus relief because he did not bring a controversy before the Court.¹¹¹ The Court characterized the instant case as a hypothetical dilemma through which Ashmus attempted to secure an anticipatory ruling in advance of the habeas proceeding.¹¹² Such a ruling, the Court reasoned, would effectively preempt potential affirmative defenses for the state before they arise in the habeas action. According to the Court, the suit was an improper attempt on Ashmus' part to "gain a litigation advantage by obtaining an advance ruling on an affirmative defense."¹¹³

The majority further noted that a ruling in the instant case would not resolve the prisoner's whole case; it would merely resolve a collateral issue governing aspects of pending or future habeas suits.¹¹⁴ Furthermore, the majority held that allowing Ashmus' suit would allow prisoners to obtain a declaration without meeting the requirement of exhausting

¹⁰⁶ Judge Beezer alone dissented, stating that the prisoners' action did not satisfy the requirements of *Ex Parte Young*. See *id.* at 1207-09.

¹⁰⁷ See *id.* at 1209.

¹⁰⁸ See *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998).

¹⁰⁹ See *id.* at 741.

¹¹⁰ *Id.* at 746-49; see also U.S. CONST., art. III, § 2. See generally WILLIAM B. LOCKHART, ET. AL., CONSTITUTIONAL LAW 1506-48 (8th ed. 1996) (discussing the doctrine surrounding Article III's "case or controversy" requirement); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 46-116, 137-63 (1997).

¹¹¹ Declaratory Judgment Act, 28 U.S.C. § 2201 (1994) (stating that in "a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought").

¹¹² See *Ashmus*, 523 U.S. at 746-48.

¹¹³ *Id.* at 747.

¹¹⁴ See *id.* at 747-48.

all of their state appeals.¹¹⁵ The Court thus concluded that prisoners must exhaust all of their state appeals before going to federal court, where they may argue the Chapter 154 issue during regular habeas proceedings.¹¹⁶ Significantly, the Court stated that “[a]ny risk associated with resolving the question in habeas, rather than a preemptive suit, is no different from risks associated with choices commonly faced by litigants.”¹¹⁷

In his concurring opinion, Justice Breyer, with whom Justice Souter joined, added that some petitioners should be able to obtain a relatively quick judicial answer to the 154 compliance questions for the purpose of providing legal guidance to other similarly situated prisoners.¹¹⁸ Breyer suggested that a “test case” could resolve repetitive litigation. He further explained that such test cases are important because in some states, the issue of whether a prisoner can amend a bare bones habeas petition most likely turns on whether the state qualifies as an opt-in state.¹¹⁹ Finally, Breyer suggested that a District Court’s answer to the 154 issue may be challenged through interlocutory appeals.¹²⁰

In short, *Ashmus* stands for the proposition that in order to challenge a state’s claim of meeting the opt-in requirements, prisoners must file a federal habeas petition even if they do not have officially appointed counsel, they do not know which statute of limitations applies, and they are unsure of which claims must be included in the petition. Only by filing a federal habeas petition may a prisoner argue that the state does not meet the statutory requirements to opt-in.

How has the Supreme Court’s ruling in *Ashmus* impacted capital prisoners in various states?¹²¹ Have states decided “test cases” to provide prisoners with answers to their 154 challenges? The next section will examine these questions.

¹¹⁵ See *id.* (explaining that the basic rationale for the exhaustion requirement is to prevent federal courts from having to wait on state courts, since federal suits may depend on state courts’ final judgments); see also *Presier v. Rodriguez*, 411 U.S. 475, 489-91 (1973) (holding that claims by prisoners regarding their confinement must be brought under habeas law, but only after exhausting state claims).

¹¹⁶ See *Ashmus*, 523 U.S. at 747-48.

¹¹⁷ *Id.* at 748. But cf. *supra* note 7 and accompanying text (inferring that one of the risks associated with waiting to resolve the question in habeas litigation is execution without an effective appeal).

¹¹⁸ See *Ashmus*, 523 U.S. at 750.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ An in-depth discussion of the Supreme Court’s analysis would be worthwhile; however, it is beyond the scope of this article. The remainder of this Article will focus on *Ashmus*’ effects on states, and its implications.

III. A POST-ASHMUS REPORT ON THE STATES

A. STATES THAT HAVE DISCUSSED CHAPTER 154 AFTER *ASHMUS*

Following the *Ashmus* decision on May 26, 1998, several federal habeas cases have addressed the states' eligibility to opt-in to Chapter 154.¹²² States that have decided these cases include North Carolina, Illinois, South Carolina, Virginia and Maryland.¹²³ In several instances, Chapter 154 is an issue courts have chosen not to reach. For example, the Fourth Circuit, in discussing a North Carolina case, merely mentioned Chapter 154 in a footnote, stating "the State does not maintain that it has satisfied the opt-in requirements of § 107 [Chapter 154] such that those provisions of the AEDPA apply."¹²⁴ Similarly, in Illinois, a District Court stated that "the respondent [the State] has not advised the court whether Illinois is an 'opt-in' state under 28 U.S.C. § 2261 [Chapter 154]."¹²⁵

Two states have reluctantly admitted their ineligibility after multiple attempts to opt-in. In a South Carolina case, the Fourth Circuit noted that although South Carolina had previously "purport[ed] to have satisfied the opt-in provisions – the State is not arguing that the provisions of § 107 . . . of the AEDPA apply."¹²⁶ Likewise, Virginia, having once attempted to opt-in, reaffirmed its 1996 decision in a footnote, stating that "the specific provision of § 107 of the AEDPA, however, [are] not applicable . . . Virginia does not meet the qualifications of § 107, thus precluding its applicability to this case."¹²⁷

Only one state, Maryland, has invoked the "test case" idea articulated in the *Ashmus* concurrence, perhaps because Maryland was one of the states where death row prisoners engaged in the § 1983 suit.¹²⁸ A Maryland capital prisoner, Eugene Colvin-El, filed a habeas corpus petition after the six-month deadline, and the state argued that his petition was barred because it had not been filed within the 180-day time limit Maryland had by opting-in to Chapter 154.¹²⁹ In a lengthy opinion, the Court explained why the petition could proceed on its merits and why Maryland did not meet the requirements to opt-in.¹³⁰

¹²² See *infra* notes 124-40 and accompanying text. Courts commonly refer to Chapter 154 as § 107 of the AEDPA.

¹²³ See *infra* notes 124-40 and accompanying text.

¹²⁴ *Sexton v. French*, 163 F.3d 874, 876 n.1 (4th Cir. 1998).

¹²⁵ *United States v. Ryan*, No.97-C2067 1998 WL 892756 at *1 n.3 (N.D. Ill. May 28, 1998).

¹²⁶ *Johnson v. Moore*, 164 F.3d 624, 1998 WL 708691, at *1 n. 2 (4th Cir. Sept. 24, 1998).

¹²⁷ *Ramdass v. Angelone*, 28 F. Supp.2d 343, 361 n.9 (E.D. Va. 1998).

¹²⁸ See discussion *infra* Part IIIA.

¹²⁹ See *Colvin-El v. Nuth*, NO.CIV.A.AW 97-2550 1998 WL 386403, at *1 (D. Md. July 6, 1998).

¹³⁰ See *id.*

First, the Court held that Maryland does not reasonably compensate the attorneys who take post-conviction appeals.¹³¹ Though there was some disagreement as to the exact amount of attorney compensation, it was approximated that post-conviction appellate attorneys receive \$30 an hour, with expenses capped at \$6,250 for appeals.¹³² Further, if the overhead of running a law office is more than \$50 an hour, as the Court approximated, capital post-conviction attorneys are "compensated at a rate substantially below the break-even point of doing business"¹³³

Second, the Court held that Maryland's standards of attorney competence are inadequate.¹³⁴ Maryland claimed to meet these requirements because their basic statutory competence standards were expanded in a Maryland Regulation, which requires that attorneys have "participated in a circuit court in at least two capital cases where the maximum penalty was 10 years imprisonment or more."¹³⁵ In addition to the fact that this regulation requires no knowledge of the extreme complexity in habeas corpus law, the Court ruled that the regulation was enforced in an ad hoc manner that did not ensure attorney competence.¹³⁶

Finally, the Court held that Maryland did not satisfy its obligation to follow procedures and appoint counsel in a specific manner as required by Chapter 154.¹³⁷ The Court reasoned that procedure is important because it safeguards against improper denial of counsel, and establishes a commencement date for the automatic 180-day stay under Chapter 154.¹³⁸ Maryland took an average of 10.59 months to appoint counsel, and since Chapter 154 requires that the six-month time limit begin in every case following final affirmation on direct appeal, the Court concluded that the offer of counsel was not meaningful.¹³⁹

Given the Court's comprehensive analysis, it seemed likely that *Colvin-El* would authoritatively decide the opt-in issue for future Maryland courts. A Maryland District Court, however, addressed the issue again in *Oken v. Nuth*,¹⁴⁰ a case with different facts but the same result—

¹³¹ See *id.* at *3.

¹³² See *id.* at *3-*4.

¹³³ *Id.* at *4.

¹³⁴ See *id.* at *5-*6.

¹³⁵ *Id.* at *5; see also MD. REG. CODE, tit. 14.06.02.05B, 1.

¹³⁶ *Colvin-El v. Nuth*, NO. CIV. A. AW 97-2520, 1998 WL 386403, at *5- *6 (defining the "ad hoc system" in Maryland as a random system where the Office of the Public Defender recruits people whom they believe to be "well known in the legal community" for post-conviction representation).

¹³⁷ See *id.* at *8.

¹³⁸ See *id.*, see also 28 U.S.C. § 2261(c).

¹³⁹ See *Colvin-El v. Nuth*, NO. CIV. A. AW 97-2520, 1998 WL 386403, at *8; see also 28 U.S.C. § 2263 (stating that the six month time limit must begin following a final decision on direct appeal); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) ("[a]ny offer of counsel pursuant to Section 2261 must be a meaningful offer.").

¹⁴⁰ 30 F. Supp.2d 877, 879-80 (D. Md. 1998).

Maryland is not an opt-in state.¹⁴¹ Steven Oken, the plaintiff in *Booth v. Maryland*¹⁴² had his habeas corpus petition deferred for almost two years while the court awaited the outcome of whether prisoners could bring § 1983 suits to resolve the 154 issue. Finally, pursuant to the Supreme Court's *Ashmus* decision, the Maryland Court adopted the earlier reasoning of the *Booth* opinion.¹⁴³

The Court held that Maryland does not meet the opt-in requirements for three key reasons: (1) it does not have codified competency standards for post-conviction counsel; (2) the compensation rates for counsel are inadequate; and (3) the reimbursable amounts are not enough to increase the compensation to a reasonable level.¹⁴⁴ Thus, Maryland has been the only state in the post-*Ashmus* period to follow the Supreme Court's advice and resolve the Chapter 154 issue through habeas litigation.¹⁴⁵ Prior to the *Ashmus* ruling, however, several states concluded that their systems are inadequate to opt-in to Chapter 154.¹⁴⁶

B. OTHER STATES THAT HAVE ADDRESSED CHAPTER 154 ISSUES

To date, no state has successfully opted-in to Chapter 154. Of the 38 states that have the death penalty,¹⁴⁷ thirteen clearly attempted to opt-in to Chapter 154 before *Ashmus* but failed because they do not meet the "quo" in the "quid pro quo" system.¹⁴⁸ For instance, when California and Florida tried to opt-in, the courts held that the states had inadequate requirements for competency of counsel, and that a backlog of unrepresented defendants demonstrated that there was not a bona fide offer of counsel to all state prisoners.¹⁴⁹ Similarly, Ohio was reprimanded for

¹⁴¹ See *id.* at 877, 879-80.

¹⁴² See *id.* at 879.

¹⁴³ See *id.* at 880 (stating that "[t]here is little need to recast Chief Judge Motz's analysis in *Booth* because this Court . . . is in virtually total agreement with that analysis").

¹⁴⁴ See *id.*; see also 28 U.S.C. § 2261.

¹⁴⁵ See *supra* notes 118-25 and accompanying text.

¹⁴⁶ See discussion *infra* Part IIIB.

¹⁴⁷ See Death Penalty Information Center, *State By State Death Penalty Information* (last modified January 1, 2000) <<http://www.essential.org/dpic/firstpage.html>> (visited April 18, 2000). States that currently have the death penalty as a sentencing option include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Some states carry out executions with relative frequency (such as Texas, Florida, and Virginia), whereas other states have death row populations but have not carried out executions in many years (such as South Dakota, Connecticut, and New York).

¹⁴⁸ See discussion *infra* Part IIIB.

¹⁴⁹ See *Hill v. Butterworth*, 941 F. Supp. 1129, 1140-44 (N.D. Fla. 1996); *Ashmus*, 935 F. Supp. at 1048. California continues to assert that it is an opt-in state. Personal Interview with John H. Blume, Habeas Assistance and Training Project Counsel (consultants to Defender

allowing public defenders discretion to deny counsel, for allowing the appointment of trial or appellate counsel in post-conviction proceedings, and for not having a mandatory appointment system.¹⁵⁰ Ohio's compensation and competency standards for counsel were also found to be inadequate.¹⁵¹ Nebraska's system allowed courts to fail to appoint counsel in post-conviction proceedings.¹⁵² Virginia could not meet Chapter 154's requirements because it had a "loose collection of statutes and regulations" rather than a "comprehensive mechanism";¹⁵³ their collection of statutes neither provided for compensation and reimbursement of litigation nor required the state to offer counsel to all death row inmates.¹⁵⁴

Additionally, Idaho, Indiana, Illinois, Missouri, Montana, North Carolina, Pennsylvania, Tennessee, and Texas have all failed to opt-in.¹⁵⁵ Louisiana was unable to opt-in because it had *no* standards for counsel at all.¹⁵⁶ Furthermore, several other states have suggested that they do not meet the requirements of Chapter 154, including Alabama, Arizona, Georgia, Mississippi, Oklahoma, and Washington.¹⁵⁷

IV. WHY STATES ARE UNWILLING OR UNABLE TO OPT-IN

States have been unwilling or unable to opt-in to Chapter 154 largely because of problems with Chapter 154 itself. The problems divide into two general categories: inefficacy and ambiguity.

Services Committee of the United States courts); Director, Cornell Death Penalty Project and Visiting Professor of Law (Nov. 5, 1999) ("In over 50 cases in California, the Attorney General has lost on whether California is an opt-in jurisdiction. It continues to raise the issue in every case.").

¹⁵⁰ See *Mills v. Anderson*, 961 F. Supp. 198 (S.D. Ohio 1997); *Scott v. Anderson*, 958 F. Supp. 330 (N.D. Ohio 1997); *Hamblin v. Anderson*, 947 F. Supp. 1179 (N.D. Ohio 1996); *Zuern v. Tate*, 938 F. Supp. 468 (S.D. Ohio 1996).

¹⁵¹ See note 150 and accompanying text.

¹⁵² See *Ryan v. Hopkins*, No. 4CV95-3391, 1996 WL 539220, at *4 (D. Neb. July 31, 1996).

¹⁵³ *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996).

¹⁵⁴ See *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996).

¹⁵⁵ See *Carter v. Johnson*, 110 F.3d 1098, 1103-04 (5th Cir. 1997); *Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35 (3rd Cir. 1997) (concession by state); *Langford v. Day*, 110 F.3d 1380, 1386 n.2 (9th Cir. 1996); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated on other grounds*, 105 F.3d 209 (5th Cir. 1996); *Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996) (en banc); *Thomas v. Gramley*, 951 F. Supp. 1338 (N.D. Ill. 1996); *Leavitt v. Arave*, 927 F. Supp. 394 (D. Idaho 1996); *Rahman v. Bell*, 927 F. Supp. 262 (M.D. Tenn. 1996); *Austin v. Bell*, 927 F. Supp. 1058 (M.D. Tenn. 1996); *Schlup v. Bowersox*, No. 4:92CV443 JHC (E.D. Mo. 1996) (unpublished); *Noland v. Dixon*, No. 3:88CV217-MU (W.D. N.C. 1996) (unpublished).

¹⁵⁶ See *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996).

¹⁵⁷ See *Smith v. Stewart*, 140 F.3d 1263, 1273 n.3 (9th Cir. 1998); *Neeley v. Nagle*, 138 F.3d 917, 922 (11th Cir. 1998); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997); *Lockett v. Puckett*, 980 F. Supp. 201, 210 n.11 (S.D. Miss. 1997).

A. INEFFICACY

By the time Chapter 154 became law, the judiciary had already substantially reconstructed habeas law with new decisions and rules, and Chapter 153 effectively codified those decisions.¹⁵⁸ The problems with habeas law, described by the Powell Committee as “unnecessary delay and repetition,” included delays caused by state court consideration of federal claims, inefficiencies due to prisoners’ non-compliance with federal and state procedure, and duplication associated with federal courts considering claims that were previously rejected in state court.¹⁵⁹

Delays were addressed in the passage of a procedural rule for habeas cases, Rule 9(a), which authorized district courts to dismiss petitions without considering their merits if the prisoner unduly delayed filing, thereby causing prejudice to the state.¹⁶⁰ The ruling in *Rose v. Lundy*¹⁶¹ lessened delays and prompted prisoners to aggregate their claims for federal court, and held that district courts should dismiss an entire petition if one claim in the petition had not been exhausted in state court.¹⁶²

¹⁵⁸ Chapter 153 of the AEDPA is largely redundant, simply repeating what courts have already done. One potential explanation for the redundancy may be that the AEDPA was largely a political product, passed by legislators who wanted credit for reforming the system and showing constituents they are “tough on crime.” See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997). As Tushnet and Yackle explain:

When the judicial train arrives at the station before the legislative one, there is little reason to enact a statute from a policy standpoint. Nevertheless, there are often good political reasons for doing so. Legislators will have built up an investment in the issue and will want to claim credit for doing something about a problem to which they have been calling public attention.

Id.; see also Yackle, *supra* note 50, at 448 (“There is no justification for reading into Pub. L. 104-132 [the AEDPA] a dramatic transmutation of the federal habeas corpus jurisdiction and its place in the machinery of American justice.”).

¹⁵⁹ Powell Committee Report, *supra* note 17, at 3239-40. See generally Tushnet & Yackle, *supra* note 158. These problems are similar to that of “unnecessary delay and repetition” discussed by the Powell Committee Report. See discussion *supra* Part I.

¹⁶⁰ See Tushnet & Yackle, *supra* note 158, at 6 (explaining that the “flexible rule discouraged procrastination, but avoided the difficulties of reconciling a rigid filing deadline with the exhaustion doctrine’s conflicting demand for deliberate delay”); see also Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(a) (printed following 28 U.S.C. § 2254 (1994)).

¹⁶¹ 455 U.S. 509 (1982).

¹⁶² See *id.* at 510. It is debatable whether 28 U.S.C. § 2264, allowing federal courts the ability to hear a claim even when the claim has not been exhausted in state court, is the right way to resolve the problem of delay. While 28 U.S.C. § 2264 may technically save more time than the *Rose* doctrine, it also means that federal courts could be resolving something that state courts are already in the process of resolving, which creates problems of inefficiency and potential unfairness.

The Supreme Court targeted efficiency problems in *Wainwright v. Sykes*¹⁶³ and practically disallowed federal habeas claim when prisoners had procedurally defaulted in past state court litigation.¹⁶⁴ Since then, the Court has expanded this doctrine twice. First, in *McCleskey v. Zant*,¹⁶⁵ the Court disallowed claims not made in an initial federal petition, but brought in a later petition.¹⁶⁶ Second, in *Keeney v. Tamayo-Reyes*,¹⁶⁷ the Court limited federal evidentiary hearings, thereby effectively disallowing claims which were raised in a timely manner in state court but which had no facts presented to support them.¹⁶⁸

Finally, the Court addressed the problem of duplication in *Teague v. Lane*.¹⁶⁹ The Court held that "new rules" of constitutional law, which had previously been unavailable for use in habeas cases, were not available to be used except in two very narrow circumstances.¹⁷⁰ Moreover, in *Teague* and subsequent cases, the Court created an expansive definition of what rules are "new"¹⁷¹ - rules that imposed "new obligations" on the government and rules that were not discussed in precedent when the prisoner's conviction became final.¹⁷² Rules that solidified federal law among lower courts¹⁷³ and rules made by applying old precedents in a new setting were also included.¹⁷⁴

Teague was criticized as being overly broad; however, the Court established the proposition that as long as a state court did not make a blatant error in convicting a prisoner, a federal court would have to create a brand new constitutional rule to find for the prisoner.¹⁷⁵ In other words, as long as a state followed proper procedures in effectuating a conviction, a federal court could not overturn the conviction.¹⁷⁶

Chapter 153 of the AEDPA, in turn, codified many of these judicial determinations.¹⁷⁷ For example, restrictions on evidentiary hearings were addressed in § 2254(e), which states that courts will not hold evidentiary hearings except when a claim relies on a new rule of constitu-

¹⁶³ 433 U.S. 72 (1977).

¹⁶⁴ *See id.* at 87.

¹⁶⁵ 499 U.S. 467 (1991).

¹⁶⁶ *See id.* at 470.

¹⁶⁷ 504 U.S. 1 (1992).

¹⁶⁸ *See id.* at 5.

¹⁶⁹ 489 U.S. 288 (1989).

¹⁷⁰ *See id.* at 309-13.

¹⁷¹ *See id.* (explaining that "new rules" that are allowed to be used are rules which deal with the ability of the state to define behavior as criminal, and rules which profoundly affect the process of finding the truth).

¹⁷² *See id.* at 301.

¹⁷³ *See* *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

¹⁷⁴ *See* *Caspari v. Bohlen*, 510 U.S. 383, 393-95 (1994).

¹⁷⁵ *See* *Tushnet & Yackle*, *supra* note 158, at 11.

¹⁷⁶ *See id.*

¹⁷⁷ *See* 28 U.S.C. §§ 2244-55 (1996).

tional law or facts that could not previously have been discovered.¹⁷⁸ The standard of review for habeas petitions was also addressed in § 2254(d), which states that an application for a writ of habeas corpus will not be granted unless a state's judgment of a claim is contrary to "clearly established Federal law" or based upon an "unreasonable determination of the facts in light of the evidence presented in the State court."¹⁷⁹ Furthermore, according to § 2255, successive motions will only be considered if they contain newly discovered evidence of actual innocence or involve a new rule of constitutional law that was previously unavailable.¹⁸⁰

Thus, pursuant to these decisions, the Supreme Court targeted the major problems of "unnecessary delay and repetition" identified by the Powell Committee and formulated solutions that were later used in Chapter 153.¹⁸¹ It follows that because courts have already made changes to habeas law and Congress adopted those changes in Chapter 153, the only advantage left for states in Chapter 154 is a six-month reduction for filing petitions. However, with Chapter 153 also requiring that habeas petitions be filed within one year of the final affirmation of conviction, this sole advantage is essentially abolished and Chapter 154 is rendered completely ineffective.¹⁸² Cutting the filing time in half by using Chapter 154 does not provide substantial gains for the state, particularly given the amount of money, time, and effort required to implement both counsel requirements and a mandatory system of appointing counsel.¹⁸³ Moreover, it is likely that many states consider the idea of making a prisoner file within six months unrealistic.¹⁸⁴ Under Chapter 154, counsel appointed immediately following the state's final conviction decision would be required to conduct a complete investigation of the case and write a complex, comprehensive habeas motion within 180 days.¹⁸⁵ Senator Biden remarked:

If we are going to adopt this one bite-out-of-the-apple approach, the single review provided in Federal court must be as thorough as possible . . . Currently there is no time limit whatsoever. I agree that there should be some time limit on filing such petitions for otherwise a pris-

¹⁷⁸ See 28 U.S.C. § 2254(e) (1996).

¹⁷⁹ 28 U.S.C. §2254(d) (1996).

¹⁸⁰ See 28 U.S.C. §2255 (1996).

¹⁸¹ See *supra* notes 158-70 and accompanying text.

¹⁸² See 28 U.S.C. § 2244(d)(1) (1996) (setting a one-year statute of limitations for all habeas petitions).

¹⁸³ See discussion *supra* Part III (discussing how difficult it is for states to opt-in).

¹⁸⁴ See *supra* note 175 and accompanying text.

¹⁸⁵ See *supra* notes 67-75 and accompanying text (detailing the procedure of Chapter 154).

oner with no incentive to speed the arrival [of] his state execution might delay the filing of his claim indefinitely. Six months, however, is too short a time for a qualified counsel and presumably very busy attorney to drop what other work he or she might be doing, conduct a thorough investigation of the case, and prepare an appropriate filing for this one bite-out-of-the-apple.¹⁸⁶

B. AMBIGUITY

The AEDPA is redundant and Chapter 154 is ineffective, but more important, Chapter 154 is simply not well written.¹⁸⁷ Its language is too vague and there are critical gaps that leave its meaning unclear.¹⁸⁸ For example, while the Powell Committee argued that a lack of qualified counsel poses a major problem in habeas corpus litigation and Chapter 154 requires states to have a system of appointing qualified counsel to expedite review, Chapter 154 fails to recommend counsel standards for states to adopt.¹⁸⁹ Senator Biden addressed this deficiency in the debates about Chapter 154 and suggested that Chapter 154 adopt the minimum qualified counsel standards from the procedure in Anti-Drug Abuse Act of 1988.¹⁹⁰

The AEDPA, including Chapter 154, developed from various political maneuvers over many years.¹⁹¹ As one commentator writes: "Proponents often added new elements . . . without reexamining old formulations in order to maintain an intellectually coherent whole. The result . . . is extraordinarily arcane verbiage that will require considerable

¹⁸⁶ 135 CONG. REC. S13471-04 (1989) (statement of Sen. Biden).

¹⁸⁷ See Yackle, *supra* note 50, at 381-82.

¹⁸⁸ See *supra* notes 181-84 and accompanying text.

¹⁸⁹ Compare Powell Committee Report, *supra* note 17, at 3240 with 28 U.S.C. §§ 2261-66 (noting that while the Powell Committee discusses insufficient counsel as one of the three main problems of habeas corpus law, there is no mention of suggested counsel requirements in the statute).

¹⁹⁰ See 135 CONG. REC. S13471-04 (1989) (statement of Sen. Biden); see also Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(q)(4)(B) & (q)(6), 102 Stat. 4181, 4393-94 (1988) (codified at 21 U.S.C. § 848(q)(4)(B) & (q)(6) (1994)). The statute states:

In any post-conviction proceeding under Section 2254 or 2255 of Title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys . . . If the appointment is made after the judgment, at least one attorney so appointed must have been appointed to practice in the court of appeals for not less than five years, and must have had not less than years experience in the handling of appeals in the court in felony cases.

Id.

¹⁹¹ See generally Yackle, *supra* note 50, at 381.

time and resources to sort out.”¹⁹² To illustrate, “direct review” is not defined anywhere in the statute, even though its meaning is extremely important; it determines when the statute of limitations begins to toll.¹⁹³ Similarly, it is unclear whether 28 U.S.C. § 2263 is really intended to trigger the clock as soon as the state conviction is final, even though counsel has not yet been appointed. Such a policy seems unjust.¹⁹⁴ Finally, although 28 U.S.C. § 2266 states that courts must render their judgments in 180 days and courts cannot delay because of “general congestion” in their calendars, it also states that the court cannot be penalized in any way by failing to comply with the time limits.¹⁹⁵

To summarize, Chapter 154 and the AEDPA are largely symbolic in nature and contain significant problems of inefficacy and ambiguity. For these reasons, Chapter 154 does not constitute good public policy, squanders judicial resources, and wastes taxpayer dollars.¹⁹⁶ But is there any way to salvage Chapter 154? Are there any improvements that might encourage states to opt-in to Chapter 154?

C. THE FUTURE OF CHAPTER 154

Most important, Congress should develop a prototype system on which states could base their own systems of counsel appointments and

¹⁹² See *id.*

¹⁹³ See *id.* at 387 (explaining that the term “direct review” will have to be interpreted “within the context of each state’s appellate system,” and that “[o]ne key issue is likely to be whether ‘direct review’ include certiorari proceedings in the Supreme Court”).

¹⁹⁴ Compare 28 U.S.C. § 2263(a) (“[a]ny application . . . be filed . . . not later than 180 days after the final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review”) with Powell Committee Report, *supra* note 17, at 3244 (stating that the statute of limitations will run after the order is entered appointing counsel). See also Yackle, *supra* note 50:

The provision specifies that the 180-day time period begins to run when direct review is complete, but it neglects to say when the state must appoint counsel for post-conviction litigation. It appears, then, that a prisoner’s time can begin to run, and, indeed, can even run out, before the state keeps its part of the bargain.

Id. at n.50.

¹⁹⁵ Compare 28 U.S.C. § 2266(b)(1)(A) with 28 U.S.C. § 2263(C)(1)(3) and 28 U.S.C. § 2264(4)(A). This discrepancy is especially disturbing when one considers the consequences if certain jurisdictions were ultimately declared to be opt-in jurisdictions. For example, if California were declared an opt-in jurisdiction tomorrow, the federal courts in the Central District of California would virtually shut down. Personal Interview with John H. Blume, Habeas Assistance and Training Project Counsel (consultants to Defender Services Committee of the United States courts); Director, Cornell Death Penalty Project and Visiting Professor of Law (Nov. 5, 1999) (“Every judge would have 3 to 4 habeas cases on his docket with more coming in all the time – there are 700 plus people on death row in California – so all other business would shut down for several years while judges tried to work through it.”).

¹⁹⁶ See, e.g., Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative “Reform” of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 94 (1991) (arguing that adopting the Powell Committee’s proposed legislation will actually cause more complex, arbitrary decisions, and the failure of courts to hold states to higher standards of counsel only increases delay in habeas litigation).

requirements.¹⁹⁷ This prototype system would preserve the strong federalist notions on which Chapter 154 is based, and would also provide states with an idea of the system they need to opt-in.¹⁹⁸ In the alternative, Congress could mandate that states follow the prototype system exactly in order to opt-in. Although this prescription may diverge from Rehnquist's ideas on federalism, it would simplify the procedure. By decreasing the amount of time and money spent on developing a system, a balance between state expenditures (finding and offering qualified counsel) and state benefits (a faster, unitary review procedure) could be maintained.

Until one of these two suggestions is implemented, states will continue to alter their counsel requirements until they get it right, the result being more litigation in which states try to decide if they got close enough to opt-in.¹⁹⁹ The continuous litigation in Maryland, South Carolina, Virginia, and California has demonstrated that the "test case" idea proposed in the *Ashmus* concurrence does not work — states can change (or not change) their systems regularly and argue again that they meet the opt-in requirements.²⁰⁰

Finally, the language of the AEDPA and Chapter 154 should be clarified so that judicial resources are not wasted discussing definitions. If the real aim of the AEDPA is to speed up post-conviction litigation, then the words of the AEDPA itself should not constitute an issue for litigants.

V. CONCLUSION

Significant changes have transpired in habeas corpus law in the four years since the AEDPA's passage. Yet, in these years of change, not one state has been able to take advantage of the "quo" in Chapter 154's "quid pro quo" system. In fact, the legacy of Chapter 154 has merely been more litigation in capital cases, the very conclusion judges and authors of the AEDPA sought to prevent. Unless federal courts or the legislature make some positive changes to jump-start the states into action, Chapter 154 will become even more ineffective in meeting the Powell Committee's goals.

¹⁹⁷ See, e.g., Benjamin Robert Ogletree, Comment, *The Anti-Terrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 667-73 (Winter 1998) (presenting a model bill that would define counsel requirements and procedures necessary to opt-in to Chapter 154).

¹⁹⁸ See *supra* note 33 and accompanying text.

¹⁹⁹ See discussion *supra* Part IV.

²⁰⁰ See discussion *supra* Part III.